

DOCKET NO.: HHD CV-20-6134761-S : SUPERIOR COURT
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 KRISTIN MILLS, ADMINISTRATOR :
 OF THE ESTATE OF CHERYL MILLS : JUDICIAL DISTRICT OF
 : HARTFORD
 :
 v. :
 :
 HARTFORD HEALTH CARE :
 CORPORATION, D/B/A HARTFORD :
 HOSPITAL, ET. AL. : SEPTEMBER 27, 2021

MEMORANDUM OF DECISION

Defendants' Hartford Healthcare Corporation d/b/a Hartford Hospital, Asad Rizvi, MD, Melissa Ferrarro-Borgida, MD, Brett H. Duncan, MD, and William J. Farrel, MD each move to dismiss the medical malpractice claim of Kristin Mills, Administrator of the Estate of Cheryl Mills on the basis of Governor Lamont's Executive Order 7V and the federal Public Readiness and Emergency Preparedness (PREP) Act, 42 U.S.C. § 247-6d et. seq. Executive Order 7V provides immunity for medical providers "while providing health care services in support of the State's COVID-19 response." The PREP acts provides immunity when a health care provider is administering any test to diagnose COVID-19, even if the plaintiff alleges gross negligence. In opposition, the Administrator argues that Executive Order 7V only provides qualified immunity which requires factual conclusions that cannot be resolved on a motion to dismiss. The Administrator further argues that she is not suing for any negligence associated with the defendants' response to the COVID-19 pandemic, but because the defendants failed to properly diagnose Ms. Mills for an impending heart attack. Thus, neither Executive Order 7V, nor the PREP Act have any application to this case. Finally, the Administrator argues that construing Executive Order

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 cc: R. J. D.
 S. Ferraro

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7V as providing immunity from suit would violate her constitutional right to access to the courts under article first, § 10 of the Connecticut Constitution.

The court resolves these issues as follows. It is settled law that a court may look to undisputed facts in the record to decide a motion to dismiss. Here, the undisputed facts demonstrate that the delay in Ms. Mills' transfer to Hartford Hospital's cardiac catheterization lab was the direct result of a delay in the reporting of Ms. Mills' COVID-19 test results and the defendants' good faith concern that Ms. Mills' symptoms were being caused by COVID-19. The court also concludes that the plain terms of Executive Order 7V and the PREP Act provide immunity from suit, not just liability, and that it is settled law that such immunity does not violate the Connecticut Constitution's guarantee of access to the courts.

Nevertheless, the court also concludes that the defendants' actions after 7:40 p.m. on March 24, 2020, are not covered by the provisions of Executive Order 7V or the PREP Act. On March 24, 2020 at 7:40 p.m., the defendants received a negative COVID-19 test for Ms. Mills, yet still delayed her transfer to the cardiac catheterization lab until the morning of March 25, 2020. Because the defendants knew Ms. Mills was COVID-19 negative after March 24, 2020 at 7:40 p.m., the defendants could no longer be providing medical care "in support of the State's COVID-19 response" and any COVID-19 diagnostic testing was at an end.

The court's reasoning is set forth in more detail below.¹

¹ To the extent the language or holdings of this memorandum of decision are perceived to conflict in any way with the court's orders at Doc. Nos. 103.86, 107.86, and 109.86, the language and holdings of this memorandum of decision control.

LEGAL STANDARD

“[A] motion to dismiss . . . attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court.” (Internal quotation marks omitted.) *Santorso v. Bristol Hospital*, 308 Conn. 338, 350, 63 A.3d 940 (2013). “A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction.” (Internal quotation marks omitted.) *MacDermid, Inc. v. Leonetti*, 310 Conn. 616, 626, 79 A.3d 60 (2013). “A court deciding a motion to dismiss must determine not the merits of the claim or even its legal sufficiency, but rather, whether the claim is one that the court has jurisdiction to hear and decide.” (Internal quotation marks omitted.) *Hinde v. Specialized Education of Connecticut, Inc.*, 147 Conn. App. 730, 740-41, 84 A.3d 895 (2014). “[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised.” *Fort Trumbull Conservancy, LLC v. New London*, 265 Conn. 423, 430 n. 12, 895 A.2d 801 (2003). Nevertheless, a court should indulge every presumption in favor of jurisdiction. *Connecticut Light and Power Co. v. Costelle*, 179 Conn. 415, 420 (1980).

When deciding a motion to dismiss, a court may consider the complaint alone, the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. See *Conboy v. State*, 292 Conn. 642, 651-652 (2009). Here, the court concludes that it can resolve the issues presented by the defendants' motions to dismiss by considering the allegations of the complaint as supplemented by undisputed facts from the record. For the undisputed facts of this case, the court looks to the pleadings of the parties, the affidavits submitted by

the parties, and the medical records submitted to the court by the parties. See *Conboy*, 292 Conn. at 652.

FACTS

The court recites the following undisputed facts from the record as necessary to decide the instant motions to dismiss.

On March 10, 2020, Governor Ned Lamont declared a public health emergency due to the spread of the COVID-19 virus and pursuant to his statutory authority under General Statutes § 28-9. On April 7, 2020, Governor Lamont issued Executive Order 7V which states that “Notwithstanding any provision of the Connecticut General Statutes or any other state law, including the common law any health care professional or health care facility *shall be immune from suit* for civil liability for any injury or death alleged to have been sustained because of the individual's or health care facility's acts or omissions undertaken in good faith *while providing healthcare services in support of the State's COVID-19 response*, including but not limited to acts or omissions undertaken because of a lack of resources, attributable to the COVID-19 pandemic, that renders the health care professional or health care facility unable to provide the level or manner of care that otherwise would have been required in the absence of the COVID-19 pandemic.” See Executive Order 7V, Section 6 (emphasis added). To date, 8,483 Connecticut citizens have died from COVID-19 and nearly 400,000 Connecticut citizens have been sickened. See <https://portal.ct.gov/Coronavirus/COVID-19-Data-Tracker>.

On March 21, 2020, Cheryl Mills presented herself at the emergency room of Backus Hospital in Norwich. Ms. Mills was 63 years old and, at time, worked as a

registrar of patients at the Backus emergency room. Ms. Mills complained of a sore throat and headache. Ms. Mills also told Backus staff that she had a heart condition. Ms. Mills was placed on a heart monitor and underwent a series of tests. Dr. Theresa Adams at Backus reviewed Ms. Mills' tests and called Dr. Asad Rizvi at Hartford Hospital. Dr. Adams told Dr. Rizvi that the Backus test results indicated that Ms. Mills was in danger of a "STEMI," which, in layperson's terms, is a severe heart attack. After reviewing Ms. Mills' Backus test results, Dr. Rizvi disagreed with Dr. Adams' assessment of Ms. Mills' condition, but Ms. Mills was nevertheless transported to Hartford Hospital.

When Ms. Mills arrived at Hartford Hospital, she told Hartford Hospital personnel that she did not know if she had been exposed to COVID-19 while registering patients at the Backus ER, and that she had also been exposed to her granddaughter who had recently been sick with a respiratory illness. Ms. Mills also underwent various cardiac tests and was examined by Dr. Rizvi. After reviewing the test results, Dr. Rizvi concluded that Ms. Mills' symptoms suggested that she may have COVID-19. Dr. Rizvi submitted an affidavit in support of the motion to dismiss stating that he was aware that viral infections could cause an inflammation of the heart muscle and that such an inflammation could cause the abnormal readings shown on Ms. Mills' cardiac tests. Dr. Rizvi's affidavit further states that the combination of Ms. Mills' potential exposure to COVID-19 through her work at Backus, and the fact that Ms. Mills' symptoms were consistent with a viral infection, led Dr. Rizvi to conclude that the virus Ms. Mills might be suffering from might be COVID-19. The court also takes judicial notice that in March of 2020, the medical community's understanding of COVID-19 was in its early stages. In her complaint and

briefs in opposition, the Administrator asserts that Dr. Rizvi ought to have recognized that Ms. Mills was suffering from a “STEMI,” not COVID-19. Nevertheless, the Administrator has submitted no facts to the court that contradict Dr. Rizvi’s affidavit that he did in fact believe Ms. Mills might be suffering from COVID-19. The court therefore concludes that it is an undisputed fact that Dr. Rizvi believed Ms. Mills might be suffering from COVID-19.

Because of his concern that Ms. Mills may have COVID-19, in the late afternoon of March 21, 2020, Dr. Rizvi ordered that Ms. Mills be placed on a heart monitor, that she be tested for COVID-19, and that, in the meantime, Ms. Mills be isolated to prevent the potential spread of COVID-19. Dr. Rizvi did not order that Ms. Mills be treated at Hartford Hospital’s cardiac catheterization lab. At the time, there was a severe shortage of Personal Protective Equipment (PPE) necessary for the treatment of COVID-19 patients. To preserve supplies of PPE, Hartford Hospital’s policy was not to admit patients suspected of having COVID-19 to the cardiac catheterization lab, absent an immediate and absolute need. This policy was in place to help slow the spread of COVID-19 and to preserve supplies of PPE.

Because a rapid test for COVID-19 was not available at the time, Ms. Mills’ COVID-19 test did not come back until March 24, 2020 at 7:40 p.m. Ms. Mills’ COVID-19 test was negative. From March 21st to March 24th, Ms. Mills was examined by, and under the medical care of, the defendants. When Ms. Mills’ COVID-19 test came back negative, Hartford Hospital discontinued isolation protocols related to COVID-19 for Ms. Mills. At approximately 6:00 a.m. on March 25, 2020, Dr. William Farrell ordered that

Ms. Mills be treated at the cardiac catheterization lab at Hartford Hospital. An appointment time was set for later that day. In the early morning hours of March 25, 2020, Ms. Mills was found dead on the floor of her bathroom at Hartford Hospital. The cause of death listed on Ms. Mills' death certificate was a heart attack.

LEGAL ANALYSIS

a. Executive Order 7V

Executive Order 7V expressly states that "any health care professional or health care facility shall be immune from suit" for any "acts or omissions undertaken in good faith while providing healthcare services in support of the State's COVID-19 response." Executive Order 7V explicitly states that it applies to "acts or omissions undertaken because of a lack of resources, attributable to the COVID-19 pandemic." As applied to the undisputed facts of this case, the court concludes that Executive Order 7V gives the defendants immunity from suit for any acts or omissions taken before Ms. Mills' COVID-19 test came back negative on March 24, 2020 at 7:40 p.m.

The court concludes that before Ms. Mills' COVID-19 test came back negative, the defendants were providing health care services in support of the state's response to the pandemic because, at that time, the defendants' had a good faith belief that they may be treating an actual COVID-19 patient. Dr. Rizvi averred that he was aware that viral infections could cause abnormal cardiac readings and that he was concerned that COVID-19 was the very viral infection causing Ms. Mills' abnormal readings. Moreover, Ms. Mills could not say that she was not exposed to COVID-19 at her job registering patients at Backus Hospital's ER and it was an entirely reasonable concern on the part of Dr. Rizvi

and the defendants that Ms. Mills may have been exposed to COVID-19 in that role. Similarly, it was a reasonable concern on the part of Dr. Rizvi and the defendants that Ms. Mills' granddaughter's respiratory virus may have been a missed case of COVID-19, particularly in the early days of the pandemic when comparatively little was known about COVID-19. Indeed, the fact that the defendants' treatment of Ms. Mills occurred just two weeks after Governor Lamont's declaration of a public health emergency, again, a time when comparatively little was known about COVID-19, is a relevant, practical factor in the court's conclusion that Dr. Rizvi and the defendants' acted in good faith. Finally, the court concludes that the circumstances of this case are plainly anticipated by Executive Order 7V because Ms. Mills' delayed transfer to the cardiac catheterization lab was directly tied to Hartford Hospital's attempt to conserve scarce PPE.

Nevertheless, the court also concludes that the defendants' actions after 7:40 p.m. on March 24, 2020, are not covered by the provisions of Executive Order 7V. On March 24, 2020 at 7:40 p.m., the defendants received a negative COVID-19 test for Ms. Mills. With actual knowledge that Ms. Mills was not suffering from COVID-19, the defendants can no longer claim they were "providing healthcare services in support of the State's COVID-19 response." Indeed, the defendants' own actions demonstrate that they knew they were no longer providing COVID-19 related medical care to Ms. Mills because they discontinued COVID-19 isolation protocols on Ms. Mills.

Having concluded that Executive Order 7V applies to the defendants' actions prior to March 24, 2020 at 7:40 p.m., the court now turns to the scope of the immunity provided. The court holds that Executive Order 7V provides immunity from suit. The court reaches

that conclusion because Executive Order 7V expressly states that “any health care professional or health care facility shall be immune from suit...” See *Vejseli v. Pasha*, 282 Conn. 561, 570-572 (2007) (discussing in the sovereign immunity context that immunity from suit means “the right not to be required to litigate at all”). Additionally, the court finds that it is settled law that statutory and common law rights of immunity do not violate article first, § 10 of the Connecticut Constitution. See *Burns v. Board of Education*, 30 Conn. App. 594, 605 (1993). Regardless, because the Administrator proceeds pursuant to General Statutes § 52-555, article first, § 10 is inapplicable. *Ecker v. West Hartford*, 205 Conn. 219, 236 (1987).

b. The PREP Act

The PREP Act, provides, in relevant part, “a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure.” See 42 U.S.C. § 247d-6d (a)(1). The PREP Act further provides that its immunity protections apply to all covered conduct other than willful misconduct, the existence of which presents “an exclusive Federal cause of action.” See 42 U.S.C. § 247d-6d (d)(1). The PREP Act states that “negligence in any form” does not rise to the level of willful misconduct. See 42 U.S.C. § 247d-6d (c).

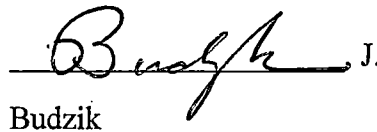
On March 17, 2020, the Secretary of Health and Human Services issued a PREP Act declaration relating to the COVID-19 pandemic. In his declaration, the Secretary defined the term “covered countermeasures” to include “any diagnostic [or] other device . .

. used to treat, diagnose, cure, prevent, or mitigate COVID-19, or the transmission of [COVID-19] or a virus mutating therefrom” See Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198 (Mar. 17, 2020).

Here, the court concludes that the PREP Act provides immunity from the Administrator’s claims based on acts or omissions prior to March 24, 2020 at 7:40 p.m. because such claims plainly are related to, and arise out of, a COVID-19 diagnostic counter measure, specifically, Ms. Mills’ COVID-19 test. The gravamen of the Administrator’s claim is that the defendants’ delayed Ms. Mills care for a heart attack because the defendants’ mistakenly thought Ms. Mills had COVID-19. The reason why the defendants’ thought Ms. Mills had COVID-19 from March 21st to March 24th arose out of and was related to the fact that they were awaiting the results of a COVID-19 diagnostic test, a “covered countermeasure” under the PREP Act. Nevertheless, similar to the court’s analysis under Executive Order 7V, the court holds that the defendant’s acts or omissions after March 24, 2020 at 7:40 p.m. are not covered by the PREP Act because, by that time, Ms. Mills COVID-19 diagnostic tests were at an end.

Finally, the court concludes that the PREP Act provides immunity from suit because those are the express words of the statute. Because the PREP Act expressly provides immunity for any negligence based claims, the court holds that Counts V through VIII (based on alleged gross negligence) also fall under the immunity provisions of the PREP Act. To the extent Counts V through VIII are based on acts or omissions prior to March 24, 2020 at 7:40 p.m., those claims are dismissed.

For all the foregoing reasons, the motions to dismiss by Hartford Healthcare Corporation d/b/a Hartford Hospital, Asad Rizvi, MD, Melissa Ferrarro-Borgida, MD, Brett H. Duncan, MD, and William J. Farrel, MD (Doc. Nos. 103.00, 107.00, and 108.00) are granted in part and denied in part. Claims based on the defendants' acts or omissions prior to 7:40 p.m. on March 24, 2020 are dismissed for want to jurisdiction. Claims based on the defendants' acts or omissions after 7:40 p.m. on March 24, 2020 are not dismissed.

 J.
Budzik

Checklist for Clerk

Docket Number: HHD CV20-6134761

Case Name: mills v. hartford

Memorandum of Decision dated: 9/27/2021










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State of Connecticut Judicial Branch Superior Court Case Look-up			
Superior Court Case Look-up Civil/Family Housing Small Claims Attorney/Firm Juris Number Look-up Case Look-up By Party Name By Docket Number By Attorney/Firm Juris Number By Property Address Short Calendar Look-up By Court Location By Attorney/Firm Juris Number Motion to Seal or Close Calendar Notices Court Events Look-up By Date By Docket Number By Attorney/Firm Juris Number Legal Notices Pending Foreclosure Sales Understanding Display of Case Information Contact Us  Comments		HHD-CV20-6134761-S MILLS, KRISTIN, ADMINISTRATOR OF THE ESTATE OF CHE v. HARTFORD HEALTHCARE CORPORATION D/B/A HARTFORD HOS Et Al Prefix: HD6 Case Type: T28 File Date: 11/09/2020 Return Date: 12/15/2020 Case Detail Notices History Scheduled Court Dates E-Services Login Screen Section Help Exhibits To receive an email when there is activity on this case, click here.	
Information Updated as of: 09/27/2021			
Case Information			
Case Type: T28 - Torts - Malpractice - Medical Court Location: HARTFORD JD List Type: No List Type Trial List Claim: Last Action Date: 09/24/2021 (The "last action date" is the date the information was entered in the system)			
Disposition Information			
Disposition Date: Disposition: Judge or Magistrate:			
Party & Appearance Information			
Party		No Fee Party	Category
P-01 KRISTIN MILLS ADMINISTRATOR OF THE ESTATE OF CHERYL MILL			Plaintiff
Attorney:  GOFF LAW GROUP LLC (438704) 75 BRACE ROAD WEST HARTFORD, CT 06107 File Date: 11/09/2020			
D-01 HARTFORD HEALTHCARE CORPORATION D/B/A HARTFORD HOSPITAL			Defendant
Attorney:  CARLTON FIELDS P.A.P.C. (420124) ONE STATE STREET SUITE 1800 HARTFORD, CT 06103 File Date: 12/15/2020			
D-02 ASAD RIZVI MD			Defendant
Attorney:  CARLTON FIELDS P.A.P.C. (420124) ONE STATE STREET SUITE 1800 HARTFORD, CT 06103 File Date: 12/15/2020			
D-03 MELISSA FERRARO-BORGIDA MD			Defendant
Attorney:  DANAHERLAGNESE PC (101685) CAPITOL PLACE/STE 700 21 OAK STREET HARTFORD, CT 06106 File Date: 12/16/2020			
D-04 BRETT H DUNCAN MD			Defendant
Attorney:  DANAHERLAGNESE PC (101685) CAPITOL PLACE/STE 700 21 OAK STREET HARTFORD, CT 06106 File Date: 12/16/2020			
D-05 WILLIAM J FARRELL			Defendant
Attorney:  STOCKMAN O'CONNOR CONNORS PLLC (005059) 32 CHURCH HILL ROAD SUITE C201 NEWTOWN, CT 06470 File Date: 12/15/2020			
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